Supreme Court, U.S.
FILED
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07-872

No. 07-

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.
Petitioner,

v.

UNITED TRANSPORTATION UNION ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Has the Eleventh Circuit erred in its repeated holding – in square conflict with other circuits – that a plaintiff is forbidden from naming as a "John Doe" defendant a party whose identity is reasonably not known at the time the complaint is filed?

RULE 29.6 STATEMENT

CSX Corporation is the only publicly traded entity that owns 10% or more of petitioner's stock.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties identified in the caption, Rufus McIntyre and unidentified members of the United Transportation Union are respondents here and were appellees below.

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STATEMENT OF THE CASE

Petitioner CSX Transportation, Inc. (CSXT) filed this lawsuit seeking declaratory and injunctive relief against an illegal work stoppage. Respondents are the defendants: a union, one if its general chairmen, and unnamed individual union members. CSXT did not identify the individual union members by name because it could not know at the time it filed the complaint which union members were participating in the unlawful work stoppage and which were instead absent from work for legitimate reasons. The court of appeals nonetheless held that the individual union members must be dismissed from the case under its rule – which other circuits squarely reject – that a complaint may not include unnamed defendants.

1. Congress enacted the Railway Labor Act (RLA) (45 U.S.C. § 151a, First) to prevent "wasteful strikes and interruptions" that would interfere with the operations of the nation's vital railroads and airlines and thereby disrupt commerce. *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 148 (1969) (hereinafter "*Shore Line*"). *See also, e.g., Int'l Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 689-90 (1963); *Texas & New Orleans R. Co. v. Ry. & Steamship Clerks*, 281 U.S. 548, 565 (1930). The RLA effectuates that purpose by severely restricting work stoppages and slowdowns in both industries.

The parties to a collective bargaining agreement covered by the RLA must maintain the status quo while they negotiate disagreements over the terms of the agreement – so-called "major disputes." During

this period, strikes and other work stoppages are unlawful. *See, e.g., Shore Line*, 396 U.S. at 149-53. Strikes are also prohibited outright over "minor disputes" – *i.e.*, those over the interpretation of existing collective bargaining agreements – which must be arbitrated. *Consolidated Rail Corp. v. Ry. Labor Executives Ass'n*, 491 U.S. 299, 302 (1989).

Carriers may bring a private suit – seeking, *inter alia*, injunctive relief – to enforce the RLA's prohibition on strikes. *Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30 (1957); *see also Chicago & North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570 (1971). Importantly, the RLA applies equally to all forbidden strikes, whether or not organized by the union's leadership: "wildcat strikes" undertaken directly by employees are equally prohibited. *See, e.g., Louisville & Nashville R.R. Co. v. Brown*, 252 F.2d 149 (5th Cir. 1958).

2. Petitioner CSXT is one of the nation's largest railroads. Petitioner and respondent United Transportation (UTU) have entered into collective bargaining agreements governing CSXT's relationship with its trainmen.

At certain intervals, petitioner must perform regular maintenance on its tracks, which requires petitioner to limit the use of affected track segments. During these track "curfews," petitioner does not call ordinary train crews – engineers and trainmen – to work. For particular curfews in the past, CSXT and the UTU reached agreements for CSXT to pay trainmen for time they did not work.

This case arises from a July 2005 curfew affecting track that runs through Erwin, Tennessee. This is a

vital rail line because it carries roughly fifty percent of all the coal that CSXT delivers to utilities in the Southeast. Declaration of Michael Sullivan ¶ 2 [Dkt. 19].[1]

Petitioner and the UTU did not reach an agreement to pay trainmen for the July 2005 curfew. The day after the conclusion of the curfew, many of UTU's trainmen failed to return to work. As a consequence, CSXT was able to operate only seventeen of thirty-six scheduled trains.

The extraordinary absence of the trainmen in the immediate wake of an unpaid period of time led CSXT to the obvious conclusion that it was the subject of a prohibited work stoppage. CSXT believed that the UTU's members were seeking to pressure it to agree to amend the parties' collective agreement to guarantee that it would pay trainmen during curfews. Such a work stoppage – whether or not authorized by the union's leadership – would violate the RLA's status quo requirement, entitling petitioner to an injunction against the participants. *See, e.g., United Air Lines, Inc. v. Int'l Ass'n of Machinist & Aerospace Workers,* 243 F.3d 349, 362 (7th Cir. 2001); *Delta Airlines, Inc. v. Air Line Pilots Ass'n,* 238 F.3d 1300, 1309-10 (11th Cir. 2001).

CSXT immediately filed this lawsuit, seeking injunctive and declaratory relief against both the current work stoppage and other such conduct in the future. CSXT named as defendants the UTU and one of its local officials called a General Chairman. CSXT

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[1] Record citations are as they appear in the appellate briefing.

also separately included as defendants "UTU-represented CSXT employees Nos. 1 through 100 * * * who are engaging in a work stoppage against CSXT arising from the disputes addressed herein." Complaint ¶ 7 [RE 1]. CSXT further alleged that "trainmen based out of Erwin are taking much longer than usual to exercise seniority to bid back into the positions that CSXT re-established in the Erwin conductor pools." *Id.* ¶ 23.

CSXT designated the employees in this fashion, rather than naming them individually, because it could not know whether particular union members were absent from work because of the illegal stoppage. Certain trainmen could be absent, for example, because they were victims of union intimidation or pressure to participate in the work stoppage.

The district court initially granted petitioner a restraining order but subsequently denied a preliminary injunction. Pet. App. B at 6a. Petitioner continued to litigate the case because of the potential for the repetition of illegal work stoppages after future curfews.[2] CSXT submitted evidence that the failure

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[2] Although the particular work stoppage has since concluded, the case is not moot. Petitioner's complaint seeks an declaratory and injunctive relief against later unlawful activity, which is a realistic possibility given that CSXT has a track curfew that affects Erwin-based trainmen most years. Decl. of Don Noell [Dkt. 61-2]. Moreover, such an unlawful, short-term work stoppage is the prototypical "illustration of the private disputes that are preserved from mootness by the prospect of future repetition." 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533.3 (1984). *See, e.g., Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 126-27 (1974) ("[T]he great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender. . . . The judiciary

of such an extraordinary number of trainmen to report for work after the curfew could not be explained as anything other than a work stoppage prohibited by the RLA, particularly given that the engineers did show up for work without incident.[3] Petitioner also sought discovery regarding, *inter alia*, which trainmen had engaged in the work stoppage. CSXT filed a motion to compel respondents to produce certain telephone records and noticed local union officials and eleven individual UTU members who worked out of Erwin that their depositions would be taken. CSXT was prevented from taking this discovery, because respondents refused to provide phone records and filed a motion for a protective order blocking the taking of any depositions. *See* Dkt. 63-1 and Dkt. 71.

Without ruling on CSXT's effort to secure discovery, the district court granted respondents summary judgment and dismissed the case. The court found that CSXT failed to prove that the UTU and its general chairman were involved in any event. The court also found that CSXT failed to show that a work stoppage had occurred, suggesting that the absence of so many trainmen could also be explained by a hypo-

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must not close the door to the resolution of the important questions these concrete disputes present.").

[3] Between 115 and 131 trainmen normally work out of Erwin on a daily basis. Immediately after the curfew ended, more than half (66) failed to report for work. Only between five and nine trainmen per day are usually absent. *See* Complaint ¶ 22 & Exs. 4-6 [RE 1] and Decl. of Steven R. Friedman ¶ 11 [Dkt. 16-2]. In contrast, locomotive engineers returned to work in a normal manner, and CSXT did not fail to operate any trains because of a lack of engineers. Decl. of Gregory J. Allard ¶ 11 [Dkt. 42-2].

thetical "severe flu outbreak." Pet. App. B at 12a and n.5.

3. CSXT appealed. The Eleventh Circuit affirmed the district court's conclusion that the UTU and its officers were entitled to summary judgment because CSXT had failed to submit sufficient evidence to create a triable issue on the question whether those particular defendants participated in any work stoppage. Pet. App. A at 2a But the court of appeals did not accept the district court's broader conclusion that *all* the defendants were entitled to summary judgment on the ground that no work stoppage occurred. Rather, the Eleventh Circuit deemed that "a close question" (*id.*), which would of course preclude summary judgment (*see, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986) ("If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed.")).

If the Eleventh Circuit had stopped there, the case would have been remanded. CSXT would have proceeded with its RLA suit against the unnamed individual union members on the theory that they had engaged in a forbidden wildcat strike. Specifically, petitioner would have pursued its claim that there had been a work stoppage and its request for discovery regarding which union members had participated. Given the extraordinary number of trainmen who had failed to report for work at the conclusion of the curfew (*see supra* at 5 n.3), CSXT would have had a substantial prospect of prevailing.

The Eleventh Circuit held, however, that the case must be dismissed against even the unnamed individual defendants. Pet. App. A at 3a n.1. On that al-

ternative basis, it affirmed the judgment of dismissal. The court of appeals relied on that court's prior precedent holding that dismissal of claims against John and Jane Doe defendants is required because "the Federal Rules do not authorize suit against fictitious parties." *Id.* (citing *New v. Sports & Recreation, Inc.*, 114 F.3d 1092, 1094 n.1 (11th Cir. 1997); *Wiggins v. Risk Enter. Mgmt. Ltd.*, 14 F. Supp. 2d 1279, 1279 n.1 (M.D. Ala. 1998)).

The Eleventh Circuit subsequently denied CSXT's petition for rehearing or rehearing en banc (Pet. App. C), which explained that the court's ruling conflicts with an uninterrupted wall of appellate authority holding that a complaint may be filed against unnamed defendants whose identities were reasonably not known at the time it was filed.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted because the Eleventh Circuit's prohibition on the use of unnamed defendants conflicts with a uniform line of authority from other circuits. The decision below moreover significantly interferes with the proper functioning of the Railway Labor Act – particularly with respect to the operations of railroads and airlines in the southeastern United States – because it eliminates a vital tool for halting the unlawful work stoppages that Congress recognized present a direct threat to the nation's economy.

1. It is well settled in virtually every federal court outside the Eleventh Circuit that "[a] complaint * * * may name an unknown defendant by using a 'John Doe' appellation or other description if the plaintiff has been unable to ascertain the real identity of the

defendant." MOORE'S FEDERAL PRACTICE – CIVIL § 10.02 (3d ed. 2007) . "When a plaintiff is ignorant as to the true identity of a defendant at the time of filing the complaint, most federal courts typically will allow the use of a fictitious name in the caption so long as it appears that the plaintiff will be able to obtain that information through the discovery process; should that not prove to be true, the action will be dismissed." 5A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1321.

Although this Court has not squarely addressed this practice, the lower federal courts cite *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 390 n.2 (1971), as the classic example implicitly approving it. In *Bivens*, this Court permitted a suit to go forward with fictitiously named defendants until the plaintiff could properly identify and serve the proper individual defendants.

Federal appellate authority endorsing the practice has long been – with the conspicuous exception of the Eleventh Circuit – essentially uniform. *E.g.*, *Roper v. Grayson*, 81 F.3d 124, 126 (10th Cir. 1996) ("Courts have generally recognized the ability of a plaintiff to use unnamed defendants so long as the plaintiff provides an adequate description of some kind which is sufficient to identify the person involved so process can eventually be served."); *Schiff v. Kennedy*, 691 F.2d 196, 198 (4th Cir. 1982) ("we recognize the necessity for allowing John Doe suits in the federal courts"); *Duncan v. Duckworth*, 644 F.2d 653, 656 (7th Cir. 1981) ("In such cases the court has held that, instead of dismissing a complaint because it fails to identify certain unnamed defendants, the dis-

trict court should order their disclosure or permit the plaintiff to obtain their identity through discovery."); *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) ("where the identity of alleged defendants will not be known prior to the filing of a complaint," "the plaintiff should be given an opportunity through discovery to identify the unknown defendants").

As this case illustrates, the Eleventh Circuit, by contrast, deems the use of unnamed defendants to amount to the prohibited use of "fictitious parties." *See New v. Sports & Recreation, Inc.*, 114 F.3d 1092, 1094 n.1 (11th Cir. 1997) (approving dismissal of Doe defendants on ground that "fictitious party practice is not permitted in federal court"), *cited at* Pet. App. A at 3a n.1. The en banc court of appeals was given the opportunity to revisit or disavow that rule in this case, but declined.

Applying the Eleventh Circuit's rule, district courts in that circuit constantly dismiss claims against unnamed defendants. For more than twenty-five examples within the last year alone, see, *e.g.*, *Holbert v. Ga. Dep't of Human Res.*, No. 4:07-CV-071-RLV, 2007 U.S. Dist. LEXIS 89415, at *3 (N.D. Ga. Dec. 4, 2007); *Williams v. Martin*, No. 1:06-cv-2161-WSD, 2007 U.S. Dist. LEXIS 80248, at *16 n.2 (N.D. Ga. Oct. 29, 2007); *Portis v. Wal-Mart Stores, Inc.*, No. 07-0557-WS-C, 2007 U.S. Dist. LEXIS 77939, at *4 n.1 (S.D. Ala. Oct. 19, 2007); *Scurtu v. Int'l Student Exch.*, No. 07-0410-WS-B, 2007 U.S. Dist. LEXIS 78999, at *2 n.1 (S.D. Ala. Oct. 19, 2007); *Jordan v. City of Montgomery*, No. 2:06-cv-534-MEF-CSC, 2007 U.S. Dist. LEXIS 74072, at *2 n.1 (M.D. Ala. Oct. 3, 2007); *Siebert v. Allen*, No. 2:07-cv-295-MEF-WC, 2007 U.S. Dist. LEXIS 74074, at *7 n.7 (M.D.

Ala. Oct. 3, 2007); *Perry v. Fleetwood Enters.*, No. 2:06-cv-502-MEF, 2007 U.S. Dist. LEXIS 73355, at *2 n.1 (M.D. Ala. Sept. 28, 2007); *Rudd v. Geneva County Comm'n*, No. 1:06-cv-00233-WKW, 2007 U.S. Dist. LEXIS 66891, at *4 (M.D. Ala. Sept. 10, 2007); *Gallagher v. Geneva County Comm'n*, No. 1:07cv660-WHA, 2007 U.S. Dist. LEXIS 63925, at *6 (M.D. Ala. Aug. 29, 2007); *Clemons v. Wal-Mart Stores, Inc.*, No. 06-0755-WS-B, Inc., 2007 U.S. Dist. LEXIS 61860, at *4 n.3 (S.D. Ala. Aug. 20, 2007); *Fuller v. Home Depot Servs., LLC*, No. 1:07-CV-1268-RLV, 2007 U.S. Dist. LEXIS 59770, at *2 n.1 (N.D. Ga. Aug. 14, 2007); *Williams v. Allen*, No. 2:07-cv-307-MEF-SRW, 2007 U.S. Dist. LEXIS 55594, at *9-10 n.7 (M.D. Ala. July 30, 2007); *Susan J. v. Riley*, No. 2:00-cv-918-MEF, 2007 U.S. Dist. LEXIS 51232, at *5 (M.D. Ala. July 13, 2007); *Johnson v. Mobile County Sheriff Dep't*, No. 06-0821-WS-B, 2007 U.S. Dist. LEXIS 50034, at *19 (S.D. Ala. July 9, 2007); *Owaki v. City of Miami*, 491 F. Supp. 2d 1140, 1156 (S.D. Fla. 2007); *Mahmud v. Oberman*, 508 F. Supp. 2d 1294, 1297 n.1 (N.D. Ga. 2007); *Pickard v. Moore*, No. 3:07-CV-270-MHT, 2007 U.S. Dist. LEXIS 41872, at *1 (M.D. Ala. June 8, 2007); *Butts v. Tyco Healthcare Group LP*, No. 1:06-CV-1377-RLV, 2007 U.S. Dist. LEXIS 37847, at *9-*10 (N.D. Ga. May 24, 2007); *Wessinger v. Bd. of Regents*, 1:06-cv-2626-WSD, 2007 U.S. Dist. LEXIS 34936, at *3-*4 (N.D. Ga. May 14, 2007); *Billingsley v. McWhorter Farms*, LLC, 3:06-cv-795-WKW, 2007 U.S. Dist. LEXIS 30695 (M.D. Ala. Apr. 25, 2007); *Bryant v. Wausau Underwriters Ins. Co.*, No. 2:06-cv-1002-MEF, 2007 U.S. Dist. LEXIS 29005, at *2 n.1 (M.D. Ala. Apr. 18, 2007); *Hall v. Infirmary Health Sys.*, No. 06-0791-WS-B, 2007 U.S. Dist. LEXIS 18104, at *2 n.1 (S.D. Ala. Mar. 8, 2007); *Pierce v.*

Odyssey Healthcare, Inc., No. 06-0561-WS-B, 2007 U.S. Dist. LEXIS 15107, at *2 n.1 (S.D. Ala. Mar. 1, 2007); *Gillilan v. Walton*, No. 1:07-CV-27, 2007 U.S. Dist. LEXIS 8820, at *3 n.1 (M.D. Ga. Feb. 7, 2007); *Rolle v. Brevard County*, 6:06-cv-714-ORL-19JGG, 2007 U.S. Dist. LEXIS 6920, at *47-*48 (M.D. Fla. Jan. 31, 2007); *Samuels v. Joyner*, No. 06-0564-WS-M, 2007 U.S. Dist. LEXIS 3487, at *13 n.4 (S.D. Ala. Jan. 12, 2007).[4]

2. Certiorari is furthermore warranted because the Eleventh Circuit's refusal to permit the use of unnamed defendants is erroneous. Federal Rule of Civil Procedure 10(a), which governs the form of pleadings in federal district courts, simply requires that the parties be specified and nowhere precludes plaintiffs from naming Doe defendants. *See* Fed. R. Civ. P. 10(a). In applying Rule 10(a), federal courts have appropriately sought guidance from similar state court pleading rules, which permit unnamed parties. *E.g.*, *Maclin v. Paulson*, 627 F.2d 83, 87 n.4 (7th Cir. 1980) (citing *Keno v. Doe*, 74 F.R.D. 587, 588-89 n.2 (D.N.J. 1977), *aff'd*, 578 F.2d 1374 (3d Cir. 1978)). For its part, Congress implicitly approved the use of fictitious names by preventing the citizenship of a John Doe defendant in a state suit from interfer-

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[4] The Eleventh Circuit only permits plaintiffs to include unnamed defendants in two limited contexts, both distinct. First, a *pro se* plaintiff may do so, if the defendant is identified with particularity. *See Dean v. Barber*, 951 F.2d 1210, 1215-16 (11th Cir. 1992) (permitting use of fictitious name because "pleadings of *pro se* complainants are treated with special care" and defendant in that case was identified as "Chief Deputy of the Jefferson County Jail"). Second, pursuant to FRCP 15(c)(1), the plaintiff in a diversity action may do so if permitted by the applicable state court rules. *Saxon v. ACF Indus.*, 254 F.3d 959 (11th Cir. 2001) (en banc).

ing with the suit's removal to federal court. *See* 28 U.S.C. § 1441(a) ("For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.").

The framers of the Rules of Civil Procedure moreover could not have imagined that the practice would be forbidden. The naming of Doe defendants is frequently essential to ensuring that a plaintiff can obtain relief, particularly when (as in this case) the plaintiff is injured by a collective body of individuals, some of whom are reasonably not known prior to discovery. *E.g.*, *Gillespie v. Civiletti*, 629 F.2d 637, 643 (9th Cir. 1980) (lower court abused discretion by failing to permit suit to proceed when unnamed defendants allegedly violated 42 U.S.C. §§ 1983, 1985). Without the use of fictitious defendants in such instances, "it may be impossible as a practical matter to obtain complete relief." *Palmer v. Bd. of Educ.*, 46 F.3d 682, 688 (7th Cir. 1995). The naming of John Doe defendants also affords a plaintiff who reasonably does not know the particular identity of a defendant prior to the running of a statute of limitations the opportunity to seek legal relief. *See* 5A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3642.

Indeed, this is a prototypical scenario in which the use of fictitious names is appropriate. As Judge Posner has explained, John and Jane Doe designations are proper in "any case in which, usually because the plaintiff has been injured as the consequence of the actions of an unknown member of a collective body, identification of the responsible party may be impossible without pretrial discovery." *Billman v. Ind. Dep't of Corrs.*, 56 F.3d 785, 789 (7th Cir. 1995). The plaintiff's "inability to identify his injurers is not by

itself a proper ground for the dismissal of his suit. Dismissal would gratuitously prevent him from using the tools of pretrial discovery to discover the defendants' identity." *Id.*

3. The Eleventh Circuit's application of its prohibition on Doe defendants in this case is particularly troubling because it threatens to substantially disrupt the proper functioning of the Railway Labor Act in the southeastern United States. The court's ruling seriously impedes the ability of railroads and airlines to secure effective relief to enforce the RLA's terms and to protect the public interest in avoiding interruptions to carrier operations from labor disputes.

Railroads and airlines regularly face work stoppages without notice. In such cases, they must act immediately – generally within hours – to seek emergency injunctive relief in order to permit their operations to continue. If the strike is not prevented or enjoined in its early moments, carrier operations will be seriously interrupted.

It is not enough that an injunction run against a union and its leaders. Union officials often attempt to disclaim responsibility for a slowdown. *See, e.g., Delta Airlines, Inc. v. Air Line Pilots Ass'n*, 238 F.3d 1300 (11th Cir. 2001); *Am. Airlines v. Allied Pilots*, 228 F.3d 574, 577 (5th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001). In other cases, the stoppage will be the result of a genuine wildcat strike directly by the employees. Whether or not authorized by their union, concerted action by employees in disregard of the RLA's mandatory dispute resolution procedures is illegal and must be enjoined. *See, e.g., Empresa Ecuatoriana de Aviacion, S.A. v. District Lodge No. 100,*

690 F.2d 838, 841 (11th Cir. 1982) (sick-out initiated by employees); *Ry. Express Agency, Inc. v. Bhd. of Ry. Clerks*, 437 F.2d 388, 391 (5th Cir. 1971) (union lost control of local union members), *cert. denied*, 403 U.S. 919 (1971); *Louisville & Nashville R.R. Co. v. Bass*, 328 F. Supp. 732 (W.D. Ky. 1971) (wildcat strike over major dispute). More broadly, it can also take some time to restore normal operations even after union members have been ordered back to work. If the carrier cannot obtain prompt emergency injunctive relief directly against employees, the RLA's primary purpose is frustrated.

Railroads and airlines, however, often have no way of knowing in the early hours after a work stoppage begins which individual employees should be enjoined, especially if the union is denying involvement in the stoppage. A carrier often does not have time to first determine which particular union members are participating in a work stoppage, rather than absent for permissible reasons. Not surprisingly, in such cases, it is commonplace for plaintiffs (including the United States) to seek emergency injunctive relief against not only the union but also unidentified individual union members who are named as John and Jane Doe defendants. As in this case, the employer promptly seeks discovery to identify the individual participants in the work stoppage.[5]

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[5] *See, e.g., John Morrell & Co. v. Local Union 304A of the United Food & Commercial Workers*, 913 F.2d 544 (8th Cir. 1990); *Ass'n of Contracting Plumbers v. Local Union No. 2 United Ass'n. of Journeymen*, 841 F.2d 461 (2d Cir. 1988); *Elsinore Shores Assoc. v. Local 54, Hotel Employees and Res. Employees Int'l Union*, 820 F.2d 62 (3d Cir. 1987); *U.S. v. Prof'l Air Traffic*

Given the Eleventh Circuit's general rule against naming Doe defendants and its application of that rule in this case, in cases arising in the southeastern United States, unions can be counted on to move to dismiss requests for injunctive relief against union members who are included as unnamed defendants. In light of the circumstances in which such cases arise – with employers seeking injunctive relief to maintain their operations before they have the opportunity to identify individual participants in the strike – the rule applied by the Eleventh Circuit may prevent railroads and airlines from effectively seeking relief against union members that is essential to effectuate the RLA. This Court's intervention is accordingly warranted.

Controllers Org., 653 F.2d 1134 (7th Cir. 1981); *Joseph Schlitz Brewing Co. Container Div. v. Gen. Drivers, Warehousemen & Helpers Local Union 745*, 486 F. Supp. 320 (E.D. Tex. 1979).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15637

D.C. Docket No. 05-00672 CV-J-25-TEM

CSX TRANSPORTATION, INC.,

Plaintiff-Appellant,

versus

UNITED TRANSPORTATION UNION,
RUFUS MCINTYRE, General Chairman,
United Transportation Union, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(June 7, 2007)

Before ANDERSON, MARCUS and COX, Circuit Judges.

PER CURIAM:

CSX Transportation, Inc. ("CSX") appeals following the district court's grant of summary judgment in favor of the Defendants United Transportation Union and Rufus McIntyre, the Union's General Chairman. CSX presents three arguments on this appeal: (1) the district court erred in granting summary judgment to the Defendants; (2) the district court erred in granting summary judgment while discovery motions were still pending; and (3) the district court erred in denying CSX's motion for leave to amend the complaint. After oral argument and careful consideration, we conclude that none of these arguments warrants reversal.

The district court's decision that no substantial evidence supports CSX's claim that a work stoppage or slowdown occurred presents a close question. That decision need not detain us, however, because we conclude that the district court properly determined that there was no genuine issue of material fact as to the Defendants' involvement in any work stoppage or slowdown and that no substantial evidence supported the claim that the Defendants were involved in any work stoppage or slowdown.

We reject CSX's argument that the district court abused its discretion in ruling on the summary judgment motion while discovery motions were pending because CSX explicitly asked the court to proceed to rule on the summary judgment motion.

And, we find no abuse of discretion in the denial of CSX's motion for leave to amend the complaint because the district court properly determined that the amendment would be futile given the lack of evidence that Defendants were involved in illegal job action.

AFFIRMED.[1]

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[1] The complaint names as defendants "John 1 & Jane Doe, UTU Represented CSXT Employees Nos. 1 through 100." This is no impediment to the closing of this case because the Federal Rules do not authorize suit against fictitious parties. *See New v. Sports and Recreation, Inc.*, 114 F.3d 1092, 1094 n.1 (11th Cir. 1997); *Wiggins v. Risk Enter. Mgmt. Ltd.*, 14 F. Supp. 2d 1279, 1279 n.1 (M.D. Ala. 1998).

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CSX TRANSPORTATION, INC.,

Plaintiff,

vs.

UNITED TRANSPORTATION UNION, et al.

Defendants.

_____/

ORDER

This Case is before the Court upon Defendants' Motion for Summary Judgment (Dkt. 38) and Plaintiff's Motion for Reconsideration (Dkt. 59). Upon consideration of the evidence in this case, the Court finds as follows:

Background

Plaintiff CSX is a common carrier by railroad throughout the eastern United States. The workers relevant to this case are called trainmen and they are generally paid only when they work.

CSX asserts that Defendants engaged in a concerted, multiple day work stoppage or slowdown in the Erwin, Tennessee area in July of 2005. CSX con-

tends that the alleged stoppage or slowdown occurred because of an underlying dispute regarding its right to adjust certain labor pools and implement a temporary unpaid[1] shutdown, or curfew, on the relevant line.[2] Prior to the July 2005 shutdown at issue, how-

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[1] Evidently in the past, CSX paid the relevant employees when it temporarily shut the line down.

[2] In its initial pleadings and at the hearings in this case, CSX argued that the underlying dispute arose because the parties could not agree on whether the trainmen should be paid during the shut down. The Union took the position that Article 25 of the Collective Bargaining Agreement (Agreement) required CSX to either reduce the number of employees to zero during the shutdown – so the employees could seek work elsewhere – or keep the employee labor pool at 100%.

CSX took the position that a September 8. 2003 letter (Letter) allowed it to reduce the trainmen labor pool when the level of train traffic declined for reasons such as the July 2005 maintenance shut down. In essence, CSX took the position that the Letter modified Article 25.

CSX further contended that the Letter provided that both sides confer and reach an agreement on issues such as the July 2005 shutdown and if the parties fail to reach an agreement, CSX may make a temporary adjustment to the labor pool. If an adjustment occurs, the Union may then file a grievance under Rule 30 of the Agreement.

Regarding the failure of some of the trainmen to go back to work, the Union argued that the relevant employees were exercising an implied contractual right to take as long as 29 days off before "bidding" to another position – i.e. exercising their "displacement rights." According to the Union, during that 29 day period, the trainmen are under no obligation to be available for work.

Basically, the Union argued that there was no actual dispute under The Railway Labor Act (RLA): CSX simply failed to deal with its employees properly when it deviated from its past practice of paying them during shutdowns.

Also according to the Union, its representative initially asked that all positions be re-established on July 16,2005 but they

ever, the Union and CSX had reached an agreement regarding the labor pool adjustment.

CSX filed a Complaint and a Temporary Restraining Order (TRO) motion shortly after it reopened the line based on its position that many of the relevant workers were not returning to work quickly, thereby reducing its ability to operate ample trains. The Court granted the TRO motion after a hearing. While not making a definitive finding that Defendants were in fact engaging in a work stoppage or slowdown, the TRO prohibited any potential work stoppage or slowdown and directed the Union to put its employees on notice of same.

CSX then filed a Motion for Preliminary Injunction (Injunction Motion). The Injunction Motion sought to enjoin Defendants from engaging in a similar alleged work stoppage or slowdown in the future.

The Court denied the Injunction Motion after a hearing. In the Order denying the Injunction Motion, the Court found that CSX had not met all of the prerequisites for issuance of a preliminary injunction.

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were not; no jobs were available for the relevant employees on that day. Evidently on July 17, 2005, jobs were available but CSX did not contact the relevant employees regarding same; to find out about an opening, the employees would have to call CSX or check online. It appears that CSX did not contact the Union about the lack of trainmen until the next day, July 18, 2005, the same day it filed its Complaint and TRO motion.

At the hearings in this Case, the Union argued and provided evidence that it did attempt to get the trainmen back to work after CSX contacted it. By the time this Court held the preliminary injunction hearing the vast majority of the "displaced" trainmen had returned to work.

First, the Court found that Plaintiff had not proven that "unlawful acts have been committed:" CSX failed to prove any actual work stoppage had occurred. The Court found that CSX's statistical evidence of a work stoppage had been sufficiently rebutted by Defendants' proffered statistics. The Court also noted that Defendants argued, and CSX all but conceded, that there was no ongoing work stoppage or slowdown at the time the Court held the Injunction Motion hearing.

The Court further found that at that time of the Injunction Motion hearing, CSX simply could not demonstrate a threat of continuing irreparable harm. Evidently, at that time the underlying dispute regarding CSX's ability to adjust certain labor pools was being dealt with via the procedures outlined in the parties' collective bargaining agreement.

Defendants now seek summary judgment as to CSX's entire Complaint. Evidently, in response to Defendants' summary judgment motion, CSX filed not only an opposition but also a motion to amend its Complaint, seeking to add new claims. The Court denied the Motion to Amend and Plaintiff has filed a motion for the Court to reconsider this ruling.

As to the summary judgment motion, CSX's opposition complained that at the time Defendants filed their Motion, discovery had "not even commenced." The Court noted in its Order denying the Motion to Amend that in its opposition CSX represented that it had "learned additional details concerning its claims" since the original Complaint tiling. The Court presumed that at the very least some informal discovery had in fact commenced. Of course, the Court had held

evidentiary hearings in this case on July 20 and 28 of 2005.

In addition, the Court notes that CSX filed its response to the Summary Judgment Motion on October 24, 2005. CSX did not file a motion to extend its response time or ask the Court to defer ruling on the Summary Judgment Motion. Thus, the Summary Judgment Motion was clearly ripe when CSX tiled its Motion to Amend.

Regardless, out of an abundance of caution, the Court allowed CSX to supplement its response to the Summary Judgment Motion, including argument and any recently discovered evidence that supports the response. CSX did supplement its response and also filed a report generated by a statistician, Dr. Carrington, as well as the declaration of Mr. Noell, CSX's labor relations manager.

Motion for Reconsideration

A court will reconsider a ruling only when 1) there is an intervening change in controlling law, 2) new evidence becomes available, or 3) the court needs to correct clear error or manifest injustice. *Teresa* G. *Sussman v. Salem, Saxom* & *Nielsen,* 153 F.R.D. 689, 694 (M.D. Fla. 1994).

CSX argues that this Court should reconsider its Order denying its Motion to Amend because: (1) the Court must apply the same standard as a Motion to Dismiss, rather then Summary Judgment, when determining whether amendment would be futile; (2) the proposed Complaint raised new claims in that it

included a claim regarding a major dispute; (3) Count I of the Amended Complaint does not amount to a renumbering of Count II; (4) UTU never abandoned its position that its members should be paid during curfew; (5) the Court found that the proposed amendment to add Count III would be futile based on its preliminary finding that CSX had not proffered sufficient evidence to demonstrate a work stoppage; (5) [sic] the Court erred in finding "the meager and reluctant steps that the [union took to get the trainmen back to work] met the requirement of 'all practical steps' within the meaning of [the Statute];" and, (6) [sic] the Court's conclusion that a adding a monetary claim would be futile was "clear error."

As to the standard of review, at the time the Court denied the Motion to Amend, the Court had already held a Temporary Restraining Order and Preliminary Injunction hearing and was ready to rule on the fully briefed Summary Judgment motion. Given the procedural posture of the case, it was not inappropriate to comment on the evidence of record as it relates to summary judgment.

Also, as previously noted by the Court, the Motion to Amend appeared to amount to an additional response to the pending summary judgment motion. It is again worth mentioning that this case revolved around an alleged three day "job action" that occurred in July of 2005 and at the time of the Preliminary Injunction hearing, the alleged action was over. Denying the Motion to Amend at this stage was not

improper. *Addingtorm v. Famer's Elevator Mut. Ins. Co.*, 650 F.2d 663, 667 (5th Cir. 1981).[3]

Defendants also note that the rest of the motion is a repetition of previously rejected arguments, which cannot serve as the a [sic] basis for a motion to reconsider. This Court agrees with the Defendants' argument and need not discuss each and every issue that Plaintiff complains about.

Because there has been no intervening change in controlling law, new evidence has not become available, and the Court does not need to correct clear error or manifest injustice, CSX's Motion for Reconsideration is denied.

Motion for Summary Judgment

Summary judgment is proper "if the pleadings, depositions. answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). In reaching a summary judgment decision the court must view the facts in the light most favorable to the non-moving party. *United of Omaha Llfe Ins. Co. v. Sun Life Ins. Co. Of America,* 894 F.2d 1555, 1558 (11th Cir. 1990). However, in order to

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[3] In *Bonner v. City Prichard,* 661 F.2d 1206, 1209-11 (11th Cir. 198l) (en banc), the new Eleventh Circuit adopted as binding precedent all cases decided before October 1, 1981 by the former Fifth Circuit Court of Appeals.

avoid entry of summary judgment the non-moving party "may not rest upon the mere allegations or denials" of his pleadings: instead, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

As to the Complaint's claims, Defendants first argue that summary judgment is due to be granted because CSX cannot prove that a work stoppage was, and continues to be, committed. Defendants maintain that such a finding is foreclosed by this Court's prior findings in its Preliminary Injunction Order. CSX argues that any prior findings are not binding on the Court. Regardless, the Court notes that its Injunction Order docs not make a definitive finding whether a work stoppage or slowdown occurred during the relevant time period. A discussion of the parties' evidence is necessary.

Plaintiff's evidence that a work stoppage or slowdown occurred is primarily statistical. Plaintiff proffers the declaration of Gregory J. Allard who is the director of the Crew Management Center. Mr. Allard's declaration states that there were 63 trainmen displaced the last day of the curfew, July 17, 2005, and that there were 29 trainmen displaced on July 20, 2005. Mr. Allard contends that these numbers are "significantly greater than the number of employees normally in displaced status." (par. 12 of Allard's declaration).

As noted, Plaintiff's supplement to its original opposition includes a report generated by a statistician,

Dr. Carrington.[4] Plaintiff contends that the report demonstrates that the relevant trainmen were abnormally slow returning to work and that the likelihood that the trainmen would return to work as slow as they did *by chance* is essentially zero.

Even assuming that CSX's statistics on this issue are not in dispute, this evidence does not even come close to demonstrating there is a genuine issue of material fact as to whether an unlawful work stoppage occurred and whether any of the Defendants organized, encouraged, or even had advance knowledge of same.[5]

Specifically, proving that the trainmen were "abnormally slow" in returning to work does not amount to proof that an *illegal* job action occurred, especially considering the fact that the curfew did not end when originally planned and, evidently, the trainman were informed of the line's re-opening in the middle of the night and presumably only if they took the initiative to check; these circumstances could at least partially

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[4] The supplement also includes the declaration of Mr. Noell, CSX's labor relations manager, Mr. Noell's Declaration states that future curfews will occur that are similar to the 2005 curfew at issue.

[5] Indeed, if the Court accepted CSX's apparent argument that demonstrating a slow rate of return to work could not have occurred "by chance," is enough to demonstrate the requisite *illegal* slowdown occurred, a severe flu outbreak causing many employees to miss work (and not quickly return) would also tend to demonstrate the same proposition. Simply put, evidence that an unusually large amount of employees are not present at work does not mean that there is a nefarious motive explaining their absence.

explain the trainmen's slow return. Regardless, the Court need not speculate as to this point.

As to the Union, Defendants argue, and this Court agrees, that there is also no evidence to support the proposition that it had any role in any alleged work stoppage/slowdown. CSX cites *Delta* when discussing the Union's obligations regarding work slowdowns. *Delta Air Lines, Inc. v. Air Line Pilots, Ass'n, Intern.*, 238 F.3d 1300, 1309 (11th Cir. 2001) (*Delta).* However, *Delta* is distinguishable because in that case the Court found there an "ongoing campaign" involving the union and that the pilots involved in that case *had* engaged in a concerted effort to affect the outcome of contract negotiations. Here, CSX fails to provide *any* evidence of concerted activity. In the absence of such evidence, CSX cannot contend that there is a genuine issue of material fact sufficient to defeat summary judgment as to the Union. Further, an employer must proffer more than mere statistics to demonstrate union liability regarding an illegal job action. *United Air Lines, Inc. v. International Assn'n of Machinist and Aerospace Workers, AFL-CIO,* 243 F.3d 349, 366 (7th Cir. 2001) ("statistics alone will not provide clear proof of a union's involvement in a work action....").

Further, as to the individual employees, Plaintiff has provided no evidence that any individual employee coordinated or discouraged any trainman from seeking work during the relevant time period. Defendants note that while CSX had authority to investigate individual employee conduct and discipline the workers that were allegedly involved in a slowdown or stoppage: evidently, as of the date the Motion was

filed, it had not. Defendants have produced the declaration of the Union's Chairperson which states the time to initiate such action has expired. (McIntyre at par. 4).

In conclusion, this Court agrees with Defendants that CSX's evidence proves, if anything, that certain employees "marked up" for work at a slower pace than usual after an unpaid furlough. Even after being allowed the opportunity to supplement, CSX has not produced *any* evidence that any *illegal* job action occurred much less that any Defendant encouraged an illegal job action. Accordingly, it is **ORDERED**:

1. Plaintiff's Motion for Reconsideration (Dkt. 59) is **DENIED**.

2. Defendants' Motion for Summary Judgment (Dkt. 38) is **GRANTED**. The clerk is directed to enter judgment in favor of Defendants and against Plaintiff and close this case.

DONE AND ORDERED at Jacksonville, Florida this 25th day of September, 2006.

/s/ Judge Adams /s/
Henry Lee Adams, Jr.
United States District Judge

Copies to: Counsel of Record

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15637

D.C. Docket No. 05-00672 CV-J-25-TEM

CSX TRANSPORTATION, INC.,

Plaintiff-Appellant,

versus

UNITED TRANSPORTATION UNION,
RUFUS MCINTYRE, General Chairman,
United Transportation Union, et al.,

Defendants-Appellees.

On appeal from the United States District Court
for the Middle District of Florida

(October 1, 2007)

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before ANDERSON, MARCUS and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Judge Cox /s/

United States Circuit Judge